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# Pennsylvania's Doctrine of Necessities: An Anachronism Demanding Abolishment

## I. Introduction

The husband's duty to support his wife . . . and the wife's duty to render services to her husband . . . are two of the most ancient concepts of the common law. . . .

The very terms of these duties seem somewhat strange and harsh to the ear. They may have some charm of apparent antiquity, but they also cause a certain disquietude from their seeming lack of adaptation to our present needs.<sup>1</sup>

Pennsylvania's common law doctrine of necessities has been stated as follows:

A husband is under a legal duty to support his wife and children, and where he neglects this duty, one who supplies necessities for their support may recover their cost in an action under the common law, which raises an implied promise, on the part of the husband, to pay.<sup>2</sup>

The passage of the Pennsylvania Equal Rights Amendment,<sup>3</sup> with its broad mandate of no gender-based legislation, has caused Pennsylvania courts to question the continuing validity of the doctrine of necessities. All Pennsylvania courts that have grappled with this issue have determined that the Equal Rights Amendment (ERA) renders this centuries old common law doctrine unconstitutional.<sup>4</sup> Therefore, the question that remains in dispute is whether the doctrine of necessities can be modified to conform to the

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1. Paul Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857, 857 (1943).

2. *Gessler v. Gessler*, 124 A.2d 502, 505 (Pa. Super. Ct. 1956). See also *Adler v. Adler*, 90 A.2d 389, 390 (Pa. Super. Ct. 1952).

3. See *infra* note 37.

4. See *Albert Einstein Med. Ctr. v. Gold*, 66 Pa. D. & C.2d 347 (Phila. Co. 1974); *Albert Einstein Med. Ctr. v. Nathans*, 27 Fiduciary Rep. 561 (Phila. Co. 1977); *Nan Duskin v. Parks*, 11 Pa. D. & C.3d 299 (Phila. Co. 1978); *Park Ave. Hosp. v. Klees*, 20 Pa. D. & C.3d 124 (Northumberland Co. 1981).

mandates of the ERA, or whether the courts should abolish the doctrine altogether.<sup>5</sup>

The social role of women and the institution of marriage have undergone vast changes since the development of the doctrine.<sup>6</sup> More often than not, both husband and wife work to contribute to the household income.<sup>7</sup> No longer do "women fall in the category of those who require this financially protective doctrine, nor do all men serve the function of sole provider."<sup>8</sup> As a result, the doctrine of necessities neither meets the needs of the modern family nor recognizes the capabilities of today's woman.<sup>9</sup>

This Comment contends that the passage of the ERA coupled with the changing marital roles of both men and women renders the necessities doctrine and any subsequent modifications made by Pennsylvania courts obsolete. Specifically, this Comment argues that the premise for the doctrine's protective benefits no longer exists; consequently, the courts should abolish the doctrine and its current modifications. Part II explores the background of the

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5. Two states, Virginia and Maryland, have judicially abolished their respective doctrines of necessities. See discussion *infra* Part IV.

6. In contemporary marriages, assignment of support, housekeeping and childcare tasks are tailored to each family's needs and determined by individual abilities rather than by sex. See Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1796 n.141 (1984) [hereinafter Note]. For example, in *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980), Justice Stevens, in a concurring opinion noted that three types of support arrangements now exist within marriage: "(1) those in which the husband is dependent on the wife; (2) those in which the wife is dependent on the husband; and (3) those in which neither spouse is dependent on the other." 446 U.S. at 154 (Stevens, J., dissenting).

7. The following statistics are indicative of the growing changes in the economics of family life:

[In] 1988, 52 percent of all married women with children under the age of one were in the labor force. In fact, married women with preschool children represent the fastest growing category of workers in the U.S. economy. In 1989, only 22% of U.S. husband-wife families had the husband/father as the sole breadwinner in keeping with the traditional image of the nuclear family, while 49 percent had both partners working.

JOAN HOFF, LAW GENDER AND INJUSTICE 289 (1991).

However, statistics do recognize that men and women are not yet economically equal. For example, in the fourth quarter of 1991, women who worked full-time had median earnings of \$375/week compared to \$503/week for men who worked full time. *Weekly Earnings Increased 3.3 percent for Wage, Salary Workers in 1991*, 24 Daily Lab. Rep. (BNA), at B4 (Feb. 5, 1992).

8. Mary Elizabeth Borja, Comment, *Functions of Womanhood: The Doctrine of Necessaries in Florida*, 47 U. MIAMI L. REV. 397, 418 (1992).

9. One scholar recently criticized Florida's retention of the necessities doctrine as "fr[eezing] in time the role of women" and as representative of a longing for the "return to a mythical past." *Id.* at 418.

doctrine of necessities. Discussion focuses on the traditional roles of husband and wife that were the mainstay underlying the doctrine's development and the purposes that the doctrine sought to achieve. Part III addresses the passage of the ERA in Pennsylvania. This section details the amendment's subsequent effect on other areas of domestic relations in Pennsylvania. This discussion will illustrate that the ERA and the principles which it endorses demand that the courts abolish any form of the necessities doctrine. Part IV details the various options available to Pennsylvania courts regarding modification of the doctrine and describes the advantages and disadvantages of each approach. Part V outlines the path, albeit ambivalent and crooked, taken thus far by the Pennsylvania courts regarding how to modify the doctrine. Finally, Part VI explains why abolition of the necessities doctrine is the only way to insure that both the needs of the family and the mandate of the ERA are met.

## II. Pennsylvania's Doctrine of Necessities

To fully understand the common law doctrine of necessities, one must first examine the roles of the husband and wife within the doctrine; that is, the husband's duty to support and the wife's duty to provide services. In addition, a definition of what constitutes "necessities" provides insight as to how the doctrine was used to aid "needy" wives. Finally, an exploration of the rationale behind the doctrine reveals that its common law purpose is no longer relevant to the modern family's needs.

### A. *Husband's Duty to Support*

At common law, the husband and wife were considered one legal entity; their two identities merged upon marriage so that the husband's identity subsumed that of the wife.<sup>10</sup> The husband had a duty to maintain and support his wife with the necessities of life.<sup>11</sup> This duty of support included the cost of necessities provided to his wife by third parties.<sup>12</sup> This concept, the doctrine of necessities, has thus been stated:

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10. See 41 AM. JUR. 2D *Husband and Wife* § 2 (1995). Jay M. Zitter, Annotation, *Necessity in Action Against Husband for Necessaries Furnished Wife, of Proving Husband's Failure to Provide Necessities*, 19 A.L.R. 4th 432, 434 (1983).

11. *Id.*

12. *Id.*

A husband is under a legal duty to support his wife and children, and where he neglects this duty, one who supplies necessities for their support may recover their cost in an action under the common law, which raises an implied promise, on the part of the husband, to pay.<sup>13</sup>

According to the doctrine, the husband was responsible directly to the merchant who supplied the goods to the wife or child.<sup>14</sup> Theoretically, a merchant would be induced to sell necessities to a married woman knowing that should the husband decline to pay, the law would imply a contract between the seller of goods and the husband.<sup>15</sup>

The vendor could collect from the husband on a contract implied by law only by demonstrating the fulfillment of several conditions.<sup>16</sup> The courts generally imposed three conditions before allowing recovery under the doctrine of necessities: (1) the items purchased must have been "necessaries;" (2) the wife must have been living with the husband at the time of the wife's purchase or have been separated through no fault of her own; and (3) the husband's credit must have been relied upon by the merchant.<sup>17</sup>

### *B. The Wife's Duty to Render Services*

In return for the husband's duty to provide for her necessities, the wife had the reciprocal obligation of domestic services, consortium and taking care of the children.<sup>18</sup> Thus, the wife's marital duties were consideration for the husband's obligation.<sup>19</sup> Under the doctrine, however, the wife had no reciprocal obligation to a third party to provide necessities to her husband.<sup>20</sup> As a

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13. *Gessler v. Gessler*, 124 A.2d 502, 505 (Pa. Super. Ct. 1956). See also *Adler v. Adler*, 90 A.2d 389, 391 (Pa. Super. Ct. 1952).

14. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 265 (Hornbook Series, Student Edition 2d ed. 1988).

15. Note, *supra* note 6, at 1772.

16. *Id.* at 1767 & n.5.

17. *Id.* "The purpose of the cohabitation requirement was to insure that the husband was treated fairly. By wrongfully deserting him, the wife destroyed the contractual *quid pro quo* of his support duty-her household services-as well as the moral basis of his obligation, her fidelity." *Id.* at 1773 n.17.

18. Note, *supra* note 6, at 1772.

19. Debra S. Betteridge, Note, *Inequality in Marital Liabilities: The Need for Equal Protection When Modifying the Necessaries Doctrine*, 17 U. MICH. J.L. REF. 43, 44 n.4 (1983).

20. Borja, *supra* note 8, at 398.

result, the wife could not be held liable for necessities furnished to her family.<sup>21</sup>

### C. *Defining Necessities*

Originally, the common law defined necessities to mean only basic items of sustenance such as food, drink, clothing and shelter.<sup>22</sup> In many states, however, including Pennsylvania, the definition of necessities expanded to include all things necessary and suitable according to the husband's "rank, position, fortune, earning capacity and mode of living."<sup>23</sup> Thus, necessities was a relative term that varied with context.<sup>24</sup>

### D. *Purpose*

Historically, the purpose of the doctrine of necessities was to provide "needy" wives with necessary goods and services.<sup>25</sup> Thus, the doctrine was a means of enforcing a husband's duty to support his wife during an ongoing marriage.<sup>26</sup> The basis of this duty originated from the feudal-medieval concept that, as the head of the family, the husband was responsible for the needs of those depended on him to provide life's necessities.<sup>27</sup>

1. *Doctrine of Coverture.*—The doctrine of necessities was a direct result of a married woman's position at common law: an era

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21. CLARK, *supra* note 14, at 250.

22. Betteridge, *supra* note 19, at 43 n.1.

23. For example, in *Reichman v. Hervitz*, 66 Dauphin County Rep. 399 (1954), the Dauphin County Court of Common Pleas held that whether the wife's furs were necessities or luxuries was a question of fact rather than law to be determined according to the husband's earning capacity and mode of living.

24. For example, because the standard of whether a woman was considered "needy" varied according to the husband's lifestyle and ability to pay, a wealthy woman might be considered "needy" if she lacked caviar, a poor one if she lacked gruel. Note, *supra* note 6, at 1784.

25. See *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 328 (Wis. 1982) ("The heart of this common law rule is a concern for the support and the sustenance of the family and the individual members thereof. . . . The necessities rule encourages the extension of credit to those who in an individual capacity may not have the ability to make these basic purchases.").

26. CLARK, *supra* note 14, at 265. Scholars have criticized whether the doctrine effectively achieved its stated purpose of providing marital support. Often merchants could not ascertain at the time of purchase whether the requisite conditions were met. These uncertainties of collection discouraged merchants from providing credit to needy spouses. Note, *supra* note 6, at 1767.

27. *Park Ave. Hosp. v. Klees*, 20 Pa. D. & C.3d 124, 129 (Northumberland Co. 1981).

when a married woman could not control her own property or income, and, could not contract on her own.<sup>28</sup> The theoretical basis for the married woman's loss of legal rights was the feudal doctrine of coverture; that is, the unity of husband and wife.<sup>29</sup> Coverture resulted in a loss of both substantive and procedural rights for a woman.

Substantively, she lost control and management of her real property to her husband. . . . All of her chattels she owned at the time of marriage and those she acquired later became [her husband's absolutely]. . . . [A]s a result of her marriage a woman lost her power to transfer her own real property by an ordinary conveyance and . . . to contract with either her husband or third parties. . . . Procedurally, . . . wives could neither sue nor be sued at law unless they were joined with their husband.<sup>30</sup>

In short, the doctrine of necessities was a recognition by the courts of the limited economic potential that a married woman once possessed.<sup>31</sup>

2. *Married Women's Property Acts.*—During the 1800s, in an attempt to free women from the coverture doctrine, most states, including Pennsylvania, passed some form of the Married Women's Property Act.<sup>32</sup> The aim of these acts was to "eliminate the basic injustices of the common law rules governing the property rights of married women"<sup>33</sup> and to emancipate women from the constraints of coverture.<sup>34</sup> However, while the Married Women's Property Acts altered the legal rights of women, the acts did virtually

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28. Note, *supra* note 6, at 1770-71.

29. William Blackstone described the doctrine as follows: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . ." See, 2 WILLIAM BLACKSTONE, COMMENTARIES 430 (facsimile reprint 1979) (1765).

30. LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 36 (1969).

31. "An overbearing cycle of successive pregnancies, births, and child-rearing and [the wife's] physical handicaps, in a machineless age that depended on muscular labor, made her unavailable for work outside the home." *Park Ave. Hosp.*, 20 Pa. D. & C.3d at 129.

32. KANOWITZ, *supra* note 30, at 40. Pennsylvania's Married Woman's Property Act read, in part, as follows: "Hereafter a married woman may sue and be sued civilly in all respects and in any form of action, and with the same effect and results and consequences as an unmarried person . . ." Act of June 8, 1893, ch. 284, § 3, 1893 PA. LAWS 344, 345 (repealed 1985).

33. KANOWITZ, *supra* note 30, at 59.

34. Borja, *supra* note 8, at 401.

nothing to mitigate the duty of a husband to provide support for his wife.<sup>35</sup>

3. *Current Conditions.*—The changing social and family conditions have rendered the purpose behind the doctrine of necessities obsolete. The Court of Common Pleas of Philadelphia commented on the antiquity of the doctrine as follows:

These common law conditions no longer prevail. Technological developments have minimized the woman's physical handicaps and considerably alleviated the tedious chores of the home. Medical and scientific advances which have increased both production and population, and reduced infant mortality and increased longevity, have made birth control a desirable social objective, and have been factors liberating her from the common law requirements that tethered her to her husband and her husband's home. In two world wars she has proven her ability to do what was formerly considered to be a man's job.<sup>36</sup>

Thus, the premise and the purpose behind the necessities doctrine no longer exists. Consequently, the doctrine of necessities is out of step with the needs of modern society.

### III. Pennsylvania's Equal Rights Amendment

The passage of the Equal Rights Amendment called into question the validity of the doctrine of necessities. An examination of how the Pennsylvania courts have applied the ERA in other areas of domestic relations will provide guidance regarding how the amendment should affect the necessities doctrine. The following analysis will show how the courts have used the ERA in these areas of domestic relations to both extend rights to and impose burdens on women. However, an examination of these cases reveals that the ERA does not require an extension of the necessities doctrine to impose a reciprocal liability on the wife for the necessities of her husband. These cases, which illustrate the purpose behind the ERA and the aims that it sought to achieve,

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35. *Id.* at 402. In Pennsylvania, the Married Women's Property Act did not affect the doctrine of necessities; consequently, the husband still had a duty to provide necessities to his family. See *Adler v. Adler*, 90 A.2d 389 (Pa. Super. Ct. 1952) (holding that where deserted wife used her estate in the discharge of obligation owed primarily by husband, the law will impose a quasi-contractual relationship on husband to reimburse the wife for costs she had expended from her own estate in providing support for herself).

36. *Albert Einstein Med. Ctr. v. Nathans*, 27 Fiduciary Rep. 561, 565 (Phila. Co. 1977).



reveal that abolishing, rather than extending, the necessities doctrine would be in accordance with the ERA's mandate.

In 1971 Pennsylvania became the first state to amend its constitution to include an equal rights amendment.<sup>37</sup> The implementation of a state ERA was viewed as an "effective and expeditious" means to prevent the future enactment of discriminatory state legislation and to erase the many instances of sex-based classification in existing state laws.<sup>38</sup> Proponents of the ERA ultimately viewed the amendment as a step toward the equality of men and women, socially as well as legally.<sup>39</sup>

Within three years of the amendment, the Pennsylvania Supreme Court provided case law signaling that it would interpret the ERA to mean that no distinction may be made under the law of Pennsylvania based solely on gender.<sup>40</sup> In *Henderson v. Henderson*,<sup>41</sup> the Pennsylvania Supreme Court stated the amendment's purpose and effect in the following definitive terms:

The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.<sup>42</sup>

In accordance with the above principle, Pennsylvania courts have imposed reciprocal rights and burdens on both genders when applying the amendment to common law rules based on sex.<sup>43</sup>

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37. *Bartholomew v. Foster*, 541 A.2d 393, 395 n.3 (Pa. Commw. Ct. 1988) (The court, quoting from R. WOODSIDE, *PENNSYLVANIA CONSTITUTIONAL LAW* 193 (1985), notes that "[s]ome territories, including Wyoming and Utah, wrote equal rights provisions into their constitutions before they became states."). The amendment reads as follows: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

38. Margaret K. Krasik, Comment, *A Review of the Implementation of the Pennsylvania Equal Rights Amendment*, 14 DUQ. L. REV. 683, 685 (1976).

39. *Id.* at 686.

40. Phyllis W. Beck and Joanne A. Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 WIDENER J. PUB. L. 743, 745 (1994).

41. 327 A.2d 60 (Pa. 1974).

42. *Id.* at 62.

43. See part II, §§ A-D (discussing the effect of the ERA on alimony pendente lite, child support, consortium and marital property).

### A. *Alimony Pendente Lite*

In *Henderson*, the supreme court held that the former statutory provision allowing the payment of alimony pendente lite, counsel fees and expenses to the wife in a divorce action but not to the husband was invalid as violative of the ERA.<sup>44</sup> The court reasoned that since the amendment was intended to eliminate sex as a basis for classification, where the law provides a support remedy for the wife, it must provide one for the husband.<sup>45</sup> The legislative reaction to the pending case was to "sex neutralize" the statute.<sup>46</sup>

### B. *Child Support*

Prior to the passage of the ERA, the Pennsylvania courts had held that the primary duty to support minor children rested with the father.<sup>47</sup> However, in *Conway v. Dana*,<sup>48</sup> the supreme court abolished this presumption and held that parents have equal responsibility for child support according to their capacities.<sup>49</sup> The court determined that the presumption was "clearly a vestige of the past and incompatible with the present recognition of equality of the sexes."<sup>50</sup> The court supported its decision with two concepts: the welfare of the child and the economic capabilities of the mother.<sup>51</sup> Thus, due to the *Conway* decision and the ERA,

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44. *Henderson*, 327 A.2d at 62.

45. *Id.*

46. Before this issue reached the Pennsylvania Supreme Court, the legislature amended the alimony pendente lite statute to conform to the ERA. The words "wife," "husband," and "ex-wife" were deleted and replaced with "spouse" and "ex-spouse." See Act of June 27, 1974, ch. 139, sec. 1, § 46, 1974 Pa. Laws 403, 403 (1974) (amending 23 PA. STAT. ANN. § 46).

47. See *Commw. ex rel. Bortz v. Norris*, 135 A.2d 771, 773 (Pa. Super. Ct. 1957); *Commw. ex rel. Kreiner v. Scheidt*, 277, 131 A.2d 147, 148 (Pa. Super. Ct. 1957); *Commw. ex rel. Silverman v. Silverman*, 117 A.2d 801, 802 (Pa. Super. Ct. 1955).

48. 318 A.2d 324 (Pa. 1974).

49. *Id.* at 326.

50. *Id.* The court further stated that "[t]he law must not be reluctant to remain abreast with the developments of society and should unhesitatingly discard former doctrines that embody concepts that have since been discredited." *Id.*

51. The Pennsylvania Supreme Court explained as follows:

In the matter of child support we have always expressed as the primary purpose the best interest and welfare of the child. This purpose is not fostered by indulging in a fiction that the father is necessarily the best [sic] provider and that the mother is incapable, because of her sex, of offering a contribution to the fulfillment of this aspect of the parental obligation.

Pennsylvania courts have been more aware of the need to look at the relative resources available to both mother and father when determining the adequacy of child support orders.<sup>52</sup>

### C. *Consortium*

At common law, only the husband could recover for the loss of consortium.<sup>53</sup> However, in *Hopkins v. Blanco*,<sup>54</sup> the Pennsylvania Supreme Court held that a reciprocal right should inhere in the wife for loss of the husband's consortium.<sup>55</sup> In its reasoning, the court recalled that the premise behind the common law action of loss of consortium was that the wife was the equivalent of a chattel of her husband.<sup>56</sup> The status of the wife was similar to that of a servant; consequently, "the husband technically owned her."<sup>57</sup> The court explicitly rejected this premise and endorsed the purpose behind the ERA: that in the modern world, women and men must enjoy equal status.<sup>58</sup> Thus, since the wife is the husband's equal, no valid justification exists for treating the two differently in matters relating to the marital relationship.<sup>59</sup>

### D. *Marital Property*

At common law, the husband was presumed to be the owner of all goods in the spouses' joint possession.<sup>60</sup> In *DiFlorido v. DiFlorido*,<sup>61</sup> the supreme court ruled that in future cases regarding ownership of household goods, the presumption must be that property acquired in anticipation of, or during marriage, and possessed and used by both spouses, is held as entireties proper-

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*Id.*

52. Krasik, *supra* note 38, at 701. See also *Commw. ex. rel. Buonocore v. Buonocore*, 340 A.2d 579 (Pa. Super. Ct. 1975) (upholding a support order of thirty dollars per week against a wife when the minor children were residing with the husband); *Kaper v. Kaper*, 323 A.2d 222 (Pa. Super. Ct. 1974) (remanding to trial court to consider support order directing father to pay child support in light of ERA, as well as mother's income and relevant needs of child).

53. See *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974).

54. 320 A.2d 139 (Pa. 1974).

55. *Id.* at 141.

56. *Id.* at 140-41.

57. *Id.* at 140.

58. *Id.*

59. *Hopkins*, 320 A.2d at 140.

60. *DiFlorido v. DiFlorido*, 331 A.2d 174, 178-79 (Pa. 1975).

61. 331 A.2d 174 (Pa. 1975).

ty.<sup>62</sup> In its reasoning, the court recognized that the husband is not necessarily the sole provider.<sup>63</sup> The court further noted that even when the husband is the sole provider, most likely both spouses "have contributed in some way to the acquisition and/or upkeep of, and that both spouses intend to benefit by the use of, the goods and furnishings in the household."<sup>64</sup> Thus, in accordance with the ERA, the *DiFlorido* court invalidated the common law presumption that the man is the sole provider of the household.

Scholars have called the Pennsylvania courts' approach of taking burdens previously imposed on the husband and imposing them on the wife as the "reciprocal rights" test.<sup>65</sup> Simply put, this reciprocity test is an overt choice by the courts to equalize the status of husbands and wives rather than to invalidate a statute.<sup>66</sup> Equalization, therefore, is obtained not by extending any specific right or remedy to a husband but by interpreting the contested law as non-discriminatory on the whole.<sup>67</sup> Two reasons exist for this approach: (1) courts have hesitated to go beyond construction and to rewrite the language of the statute; and (2) the courts have feared that striking down an entire statutory provision would lead to unwanted social effects and would place the institution of the family in danger.<sup>68</sup> Thus, the reciprocity test represents a solution to the courts' dilemma of what to do in order to conform an old law to a new social mandate.<sup>69</sup>

While the reciprocity approach realizes the ERA mandate in certain areas, an extension of rights and duties is not the proper road to follow with regard to the doctrine of necessities. The areas discussed above—alimony pendente lite, child support, consortium and marital property—did not impose a burden on the wife where none previously existed.<sup>70</sup> However, extending a burden on the wife for her husband's necessities would create a liability where the wife previously did not have one.

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62. *Id.* at 180.

63. *Id.* at 179.

64. *Id.*

65. See Krasik, *supra* note 38, at 699.

66. *Id.* at 699-700.

67. *Id.* at 700.

68. *Id.* at 699.

69. For example, in order for most of the support statutes to conform to the ERA only the words "wife" and "husband" would need to be changed to "spouse." *Id.* at 699.

70. See discussion *supra* Part II, §§ A-D.

#### IV. Three Approaches to Modifying Pennsylvania's Doctrine of Necessities

This section examines three basic modifications or approaches that various state courts or state legislatures have used to accommodate their respective doctrines of necessity with recent social conditions. As previously stated, because numerous wives are not dependent upon their husbands for support, the courts can no longer presume a need to provide wives with financial protection.<sup>71</sup> A substantial number of married women work outside the home and contribute along with their husbands to family resources.<sup>72</sup> The changing marital roles in American society, along with the growing recognition that the law requires the equal treatment of both sexes, has led most courts and legislatures to address the continued validity of the common law doctrine of necessities.<sup>73</sup> All of the courts that have examined the continued validity of the necessities doctrine have held that wives are to some degree responsible for their credit purchases. The courts have done this either by modernizing the necessities doctrine or by abolishing it altogether.<sup>74</sup>

##### A. Joint and Several Liability

The most frequent modification has been to enlarge the doctrine of necessities by applying it equally to both the husband and the wife.<sup>75</sup> This approach causes both the husband and the wife to be jointly and severally liable for the necessary expenses of the other.<sup>76</sup> This modification has generally been imposed by

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71. Betteridge, *supra* note 19, at 46.

72. HOFF, *supra* note 7, at 46.

Married women with children work an average of twenty years at full- or part-time jobs; those without children, an average of thirty-five years. The most rapid employment increase occurred among married women in the 1970s. In that decade, they surpassed the number of single working women. In the process, the number of working mothers increased by a stunning 500 percent between 1940 and 1978.

*Id.*; see Betteridge, *supra* note 19, at 46.

73. Betteridge, *supra* note 19, at 46.

74. Note, *supra* note 6, at 1775.

75. Marcus L. Moxley, Survey, *North Carolina Baptist Hospitals, Inc. v. Harris: North Carolina Adopts a Gender-Neutral Approach to the Doctrine of Necessaries*, 66 N.C. L. REV. 1241, 1246 (1988) (examining the doctrine in the context of medical expenses).

76. *Id.*

statute and appears primarily in states that have adopted an equal rights amendment.<sup>77</sup>

The positive aspect of this modification is that it is gender neutral.<sup>78</sup> This gender neutral approach is also procreeitor because it affords a creditor complete choice in collecting a debt by allowing the creditor to collect payment from either spouse.<sup>79</sup> Creditors, therefore, have a greater degree of security because this modification allows them to reach the assets of either or both spouses.<sup>80</sup> Reasons supporting this modification have also included the improved economic position of women<sup>81</sup> and the marital status itself.<sup>82</sup>

However, this approach fails to consider which spouse actually incurs the debt,<sup>83</sup> and it tends to ignore the reality that spouses differ in their ability to pay for necessities.<sup>84</sup> Moreover, extension of the doctrine may achieve "equality with a vengeance" by creating liability in each spouse for the debts of another.<sup>85</sup> Such a rule also establishes relatively rigid marital economic relation-

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77. These statutes have generally been of two types: Family Expense Acts held to include necessities, *see* COLO. REV. STAT. § 14-6-110 (1987); ILL. REV. STAT. ch. 40, para. 1015 (1979); IOWA CODE ANN. § 597.14 (West 1996); WASH. REV. CODE § 26-16-205 (1986); and statutes that were enacted to deal specifically with the question of necessities, *see* HAW. REV. STAT. § 572-24 (1993); MONT. CODE ANN. § 40-2-102 (1981). Some states have adopted this modification judicially. *See* *Cooke v. Adams*, 183 So. 2d 925 (Miss. 1986).

78. In other words, these classifications do not provide for the different treatment of males and females on the basis of gender.

79. Moxley, *supra* note 75, at 1246-47.

80. Borja, *supra* note 8, at 426.

81. *See* *Manatee Convalescent Ctr., Inc. v. McDonald*, 392 So. 2d 1356, 1358 (Fla. Dist. Ct. App. 1980) ("[E]ven handed treatment of the sexes in the modern market place must carry the burden of responsibility which goes with the benefits.").

82. *Parkway Gen. Hosp., Inc. v. Stern*, 400 So. 2d 166, 167 (Fla. Dist. Ct. App. 1981) ("Our holding is that a wife is liable for her husband's bills simply and solely because of the marital relationship between them.").

83. *See, e.g., Memorial Hosp. v. Hahaj*, 430 N.E.2d 412, 416 (Ind. Ct. App. 1982); *Jersey Shore Med. Ctr. v. Estate of Baum*, 417 A.2d 1003, 1009 (N.J. 1980); *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 330 (Wis. 1982).

84. Mark S. Brennan, *The New Doctrine of Necessaries in Virginia* 19 U. RICH. L. REV. 317, 327 (1985).

85. In *Jersey Shore Med. Ctr. v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980), the New Jersey Supreme Court declined to extend the common law rule to require each spouse to be completely liable for the other's necessities, terming such a solution "equality with a vengeance" because it would result in the immediate exposure of the property of one spouse for a debt created by the other spouse. This would afford the creditor "the same benefits as if [the] spouses had agreed to joint liability." The court further stated that "[n]either equity nor reality justifies imposing unqualified liability on one spouse for the debts of the other . . . ." *Id.* at 1009.

ships. Under such a rule couples are prevented from deciding which partner will provide financial support, or in what proportion each spouse will contribute support.<sup>86</sup>

On a superficial level, the interest that married couples have in dividing support obligations between themselves may seem to be merely an economic one.<sup>87</sup> However, the implications of this allocation stretch beyond the realm of simple family economics.<sup>88</sup> "Freedom to select support roles also permits self-definition according to deep personal needs and beliefs."<sup>89</sup> Finally, the manner in which spouses apportion their support obligations expresses their values to their children.<sup>90</sup>

In response to the above criticism, scholars have argued that extension of the doctrine is not really "equality with a vengeance." To avoid such a result, the doctrine can extend to both spouses through liability on the part of either spouse for the necessary expenses of the other spouse in proportion to which each has contributed financially.<sup>91</sup> This approach, which allows the courts to take a case-by-case look at the income contributions of either spouse, preserves the freedom of the couple to formulate its own financial plan and to allocate household duties and income producing work.<sup>92</sup>

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86. Note, *supra* note 6, at 1795.

87. *Id.* at 1795-96.

88. *Id.* at 1796.

89. *Id.* The author further asserted that "[t]he self-image of one spouse may require that he cast himself primarily as a financial provider, while that of another may demand that he be a homemaker, and that of yet another may insist that he do a bit of both." *Id.* at 1796 n.141. See also *id.* at 1796 n.141.

90. *Id.*

Parents both want and are obliged to instruct their offspring in the moral and social principles that they believe are right. Through the example of their marriage, parents teach their children about intimate relationships and the appropriate social roles of men and women. Consequently, parents have a powerful interest in structuring their support obligations in accordance with their personal values.

*Id.* at 1796-97 (footnote omitted).

91. Borja, *supra* note 8, at 426.

92. *Id.* at 426-27. Moreover, because this extension of the doctrine would not impose a greater financial liability than the monetary proportion each spouse contributes, the doctrine would not place an undue burden on the resources of a spouse who performs more household services and produces less monetary income. *Id.* at 426.

### B. Debt-Incurring Spouse Primarily Liable

Some courts, including several Pennsylvania courts,<sup>93</sup> have imposed primary liability on the spouse who incurred the necessary expense and secondary liability on the spouse who did not.<sup>94</sup> This approach seeks to expand the doctrine of necessities but limits a creditor's right to pursue a claim against both spouses jointly and severally.<sup>95</sup> This approach is also gender neutral and takes into account which spouse incurred the debt.<sup>96</sup> Thus, this modification protects the nondebtor spouse.<sup>97</sup>

The Indiana Court of Appeals has endorsed this approach.<sup>98</sup> The court provided the following two reasons for its modification: (1) the changing role of the married woman and the marital relationship<sup>99</sup> and (2) the characterization of the modern marriage as a financial unit in which either spouse is liable for his or her own medical expenses, with the other spouse and the marital property secondarily liable.<sup>100</sup>

The New Jersey Supreme Court provided similar reasons for its modification.<sup>101</sup> By applying the doctrine in a gender neutral

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93. See *infra* note 125.

94. See, e.g., *Memorial Hosp. Inc. v. Hahaj*, 430 N.E.2d 412 (Ind. App. 1982); *Jersey Shore Med. Ctr. v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980).

95. *Moxley*, *supra* note 75, at 1241.

96. *Id.* at 1242-43.

97. *Id.* at 1241. The New Jersey Supreme Court addressed the need for limitations on a creditor's right to pursue the debt of marital partners:

Normally, a person is not liable for the debt of another in the absence of an agreement. The imposition of liability based on marital status alone is an exception to that rule. Nonetheless, it is a justifiable exception. The reasonable expectations of marital partners are that their income and assets are held for the benefit of the marital partnership and, incidentally, for creditors who provide necessities for either spouse. However, it would be unfair to accord the same rights to a creditor who provides necessities on the basis of an agreement with one spouse as to a creditor who has an agreement with both spouses. In the absence of such an agreement, a creditor should have recourse to the property of both spouses only where the financial resources of the spouse who incurred the necessary expense are insufficient. Marshalling the marital resources in that manner grants some protection to a spouse who has not expressly consented to that debt.

*Baum*, 417 A.2d at 1010.

98. *Memorial Hosp.*, 430 N.E.2d 412 (Ind. App. 1982) (holding wife primarily liable and husband secondarily liable for medical expenses incurred by the wife).

99. *Id.* at 416.

100. *Id.* at 415.

101. See *Baum*, 417 A.2d at 1003.



fashion, the court recognized the modern role of women in the workforce and marriage as an integral part of a single financial unit.<sup>102</sup> The court also reasoned that the statistics indicating the financial dependence of some wives on their husbands were "insufficient reason" to leave the gender-based classification undisturbed when balanced against a doctrine which "denigrates the efforts of women who contribute to the finances of their families and denies equal protection to husbands."<sup>103</sup>

This modification, however, has several shortcomings. First, it can be used to circumvent the statutory protection created by a tenancy by the entirety: protection of a surviving spouse from her deceased husband's creditors.<sup>104</sup> Second, the modification perpetuates an archaic doctrine by ignoring other legal venues available to a creditor. For example, the New Jersey Supreme Court stated that its modification is legitimate because "[a] necessary expense incurred by one spouse benefits both."<sup>105</sup> However, if nonpurchasing spouses enjoy actual benefit from their mates' acquisitions, the creditor does not need the doctrine of necessities. Rather, he can collect under the doctrine of unjust enrichment.<sup>106</sup> Third, this modification may "discourage a spouse from incurring 'necessary' debts, especially those items from which he or she would not personally benefit, such as child care costs."<sup>107</sup> This heavy incentive to neglect basic household obligations is an affront to the policy rationale that supports the doctrine of necessities.<sup>108</sup>

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102. *Id.* at 1009. "The common law must adapt to the progress of women in achieving economic equality and to the mutual sharing of all obligations by husbands and wives." *Id.*

103. *Id.* at 1008.

104. Creditors can use the modification to circumvent the tenancy by the entirety problem:

Although the *Jersey Shore* court gave its new rule prospective application, thus freeing the instant defendant, Mrs. Baum, from liability from the costs of her husband's last illness. . . , the potential harshness of the rule may be illustrated by considering how it would have affected Mrs. Baum had it been applied retroactively. She would have lost all of her equity . . . in her only asset, her home, which she had owned in tenancy by the entirety with her deceased husband. This severe result would circumvent the legislative purpose behind tenancy by entirety—protection of the surviving spouse from his or her dead mate's creditors.

Note, *supra* note 6, at 1780 n.59.

105. *Baum*, 417 A.2d at 1009.

106. Note, *supra* note 6, at 1791.

107. *Borja*, *supra* note 8, at 428.

108. *Id.*

Finally, courts advocating this modification incorrectly analogize marriage to a commercial partnership.<sup>109</sup> In most states, including Pennsylvania, marital property is owned separately.<sup>110</sup> When marital property is owned separately, neither spouse has a legal interest in the income or assets of the other.<sup>111</sup> However, this modification "transforms the status of marital property with respect to creditors from separately owned to, in practical effect, communally owned."<sup>112</sup> This patchwork system of "community property" causes the unfair treatment of spouses. Such a system imposes on spouses a liability for each other's debts without bestowing upon them any of the benefits, such as a legally defined share in one another's incomes.<sup>113</sup>

The appropriateness of this partnership analogy is also questionable. The usual goal of a partnership is profit. Marriage, however, comprises more than economics. In our modern society the most widely recognized purposes of marriage are "self-realization, personal growth, and achievement of happiness through an intimate relationship."<sup>114</sup>

### C. Primary Liability on the Husband

The third modification provides that a husband is always primarily liable and a wife always secondarily liable for all debts for necessities incurred by either spouse. At least five states have adopted this view either by statute or judicial decree.<sup>115</sup> This modification differs from others because it continues the common

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109. See *Baum*, 417 A.2d at 1008 ("A modern marriage is a partnership, with neither spouse necessarily dependent financially on the other.").

110. As of 1983, forty-two states have separate marital property systems. The states that lack such systems are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Note, *supra* note 6, at 1792 n.118.

111. *Id.* at 1792.

112. *Id.* at 1792 (emphasis omitted). See also *Baum*, 417 A.2d at 1010 ("A creditor providing necessities to one spouse can assume that the financial resources of both spouses are available for payment.").

113. Note, *supra* note 6, at 1792.

114. *Id.* at 1793. Moreover, in *Griswold v. Connecticut*, the United States Supreme Court also defined marriage as significantly more than an economic partnership stating: "[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." 381 U.S. 479, 486 (1965).

115. *Page v. Welfare Comm'r*, 365 A.2d 1118 (Conn. 1976); *Klump v. Klump*, 121 N.E.2d 273 (Ohio Ct. App. 1954); *Marshfield Clinic v. Discher*, 314 N.W.2d 326 (Wis. 1982); NEB. REV. STAT. § 42-201 (1978); OKLA. STAT. tit. 43, § 202 (1990).

law practice of imposing an unequal share of financial responsibility upon the husband.

Proponents of this approach rationalize that it comports with the economic reality that in a typical household women do not contribute an equal amount of income.<sup>116</sup> Proponents further point out that women are not represented in the work force to the same degree as men. Furthermore, a disparity of income exists between men and women in the work force; women who are in the work force do not earn as much as men.<sup>117</sup> Thus, since most women earn less than their spouses, advocates of this modification believe it would be inequitable to impose comparable support burdens on both spouses.<sup>118</sup>

The shortcomings of this modification are significant. First, when a wife is allowed to escape liability for the cost of her own necessities, "the common law doctrine discriminates against the husband under the Equal Protection Clause of the Fourteenth Amendment."<sup>119</sup> "The means employed by the doctrine are not substantially related to the goal of providing for needy spouses because the doctrine fails to include needy husbands (under-inclusive)," and it benefits non-needy wives (over-inclusive).<sup>120</sup>

Second, statistics also do not support the rationale behind this modification. Although on the average women tend to earn less than men, wives are not necessarily dependent on their husbands and therefore are not necessarily needy. On the contrary, recent statistics show that 59.4% of married women are members of the labor force.<sup>121</sup> Consequently, in at least 59.4% of all families, the wife is at most only partially financially dependent upon her husband.

Statistics thus show that the gender specification is no longer useful or required. In actuality, this modification is demeaning and dehumanizing to women as it labels them "dependent" and "needy." This label does not fit modern wives. Consequently, this modification does not aid women; rather, it stigmatizes them and perpetuates traditional stereotypical views.

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116. Borja, *supra* note 8, at 427.

117. See *Marshfield Clinic*, 314 N.W.2d at 329-30.

118. Borja, *supra* note 8, at 427.

119. Brennan, *supra* note 84, at 322.

120. *Id.*

121. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 401 (1994).

## V. Pennsylvania's Approach

No Pennsylvania appellate court has decided whether the ERA abolishes, modifies or extends the doctrine of necessities.<sup>122</sup> The lower courts that have addressed this issue have either abolished the doctrine or modified it.<sup>123</sup> Thus, the current state of the law, if not completely uncertain, is at least ambivalent. Certainty in this area is necessary for two reasons. First, a precise rule would give creditors reassurance that debts will be paid.<sup>124</sup> Second, a uniform law would lessen litigation because potential litigants would know if they had a valid claim prior to initiating an action.

### A. Modification

Some lower Pennsylvania courts have approached this issue by modifying the necessities doctrine.<sup>125</sup> In modifying the doctrine, these courts explicitly have rejected a simple extension of the common law.<sup>126</sup> The result has been a gender neutral rule that

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122. *Geisinger Med. Ctr. v. Salerno*, 40 Pa. D. & C.3d 668, 669 (Montour Co. 1986). One possible theory for the lack of appellate cases is that the monetary amount involved has not yet been large enough to render an appeal economically feasible or practical.

123. See *Hamot Med. Ctr. v. Fink*, 6 Fiduciary Rep. 2d 302 (Crawford Co. 1986) (holding husband's estate primarily liable, and widow secondarily liable, for medical care furnished to husband); *Park Ave. Hosp. v. Klees*, 20 Pa. D. & C.3d 124 (Northumberland Co. 1981) (holding each spouse primarily responsible for necessities furnished himself or herself and secondarily liable for those furnished to his or her marital partner). But see *Nan Duskin v. Parks*, 11 Pa. D. & C.3d 299 (Phila. Co. 1978) (rejecting view that equality of the sexes can be achieved under the mandate of the ERA by imposing an equal duty on the wife to pay for the necessities that may be supplied to her husband); *Albert Einstein Med. Ctr. v. Nathans*, 27 Fiduciary Rep. 561 (Phila. Co. 1977) (holding that any modification of the necessities doctrine should be made by the courts, not the legislature).

124. "[C]ertainty of compensation will encourage present and potential providers of necessities to continue to render such benefits." *Salerno*, 40 Pa. D. & C.3d at 670.

125. See *Harrisburg Med. Management v. Arnold*, 44 Cumberland L.J. 379 (1995) (holding that an extension of the doctrine of necessities that imposes the same rights and burdens on both marital partners is consistent with the ERA); *Fink*, 6 Fiduciary Rep. 2d 302 (holding husband's estate primarily liable, and widow, secondarily liable, for medical care furnished to husband); *Landfair v. Balph*, 21 Mercer Co. L.J. 278 (1985) (holding that spouse to whom necessities were provided is primarily liable while the other spouse is secondarily liable); *Klees*, 20 Pa. D. & C.3d 124 (holding each spouse primarily responsible for necessities furnished himself or herself and secondarily liable for those furnished his or her marital partner).

126. In rejecting a simple extension of the doctrine, the Northumberland County Court of Common Pleas stated:

The rule at common law was that the husband was *primarily* responsible for necessities furnished his wife. If we were to simplistically extend this duty to women, it would mean that each spouse is primarily responsible for the other,

each spouse is primarily liable for necessities furnished himself or herself and is secondarily liable for those furnished to his or her marital partner.<sup>127</sup> The premise of this rule rests on two principles: (1) it is in accordance with ERA cases decided in other areas of domestic relations;<sup>128</sup> and (2) the doctrine of necessities was a judicially created doctrine which should be changed only by the courts.<sup>129</sup>

The first principle guiding the courts in its modification of the doctrine is the mandate imposed by the ERA.<sup>130</sup> An examination of appellate court holdings under the ERA in related factual situations led to the conclusion that "[a] practical and fair reading of ERA is that it enhances the common law doctrine of necessities so that liability is not dependent upon the sex of the claimant."<sup>131</sup> However, in modifying this right, courts have emphasized that they are not "drop[ping] all concern for the non-earning members of a marriage, be they men or women":

The common law rule was not so much that the husband must pay because the wife could not, but that *someone* from the financial unit must pay, and the husband was traditionally the only one to qualify. The concern that *someone* must pay is just as legitimate today as it was hundreds of years ago. When a spouse is supplied with the necessities of life, his or her marital

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surely a nonsensical result.

*Klees*, 20 Pa. D. & C.3d at 130 (emphasis in original).

127. See *Fink*, 6 Fiduciary Rep. 2d 302; *Salerno*, 40 Pa. D. & C.3d 668; *Landfair*, 21 Mercer Co. L.J. 278; *Klees*, 20 Pa. D. & C.3d 124.

128. Those cases took common law rules based on sex and imposed similar reciprocal rights and burdens on both sides. See discussion *supra* Part II.

129. *Salerno*, 40 Pa. D. & C.3d at 670. The court further explained:

[T]he "doctrine of necessities" was a judicially created doctrine and has developed by court action in the common law. The courts in applying this doctrine and in crafting its suitable application over the years have not been enacting statutes, or thwarting laws enacted by the legislature. Rather, the doctrine has been applied by the courts in view of valid public-policy concerns bottomed upon changes in the law and societal mores.

*Id.*

130. The Northumberland County Court of Common Pleas explained the effect of the ERA on the doctrine of necessities as follows:

[B]ecause the common law was concerned with the ability of members of the family to obtain necessary support, it looked to the husband who played the dominant economic role in society. Today, because of the requirements of the ERA we cannot continue to make this distinction, as it is based solely upon the sex of those involved.

*Klees*, 20 Pa. D. & C.3d at 130.

131. *Landfair*, 21 Mercer Co. L.J. at 281.

partner is also benefitted, and therefore, both ought to be liable for them.<sup>132</sup>

In addition to the above reasoning, courts have also based their modifications on the principle that a "marriage creates a single financial unit."<sup>133</sup> The reasonable expectations of the marital partners and their creditors are that each partner's income and assets are held for the benefit of the marital partnership.<sup>134</sup>

Since the doctrine of necessities is a judicially created doctrine, courts advocating a modification of the doctrine have been adamant in their ability to do so. In *Park Ave. Hosp. v. Klees*,<sup>135</sup> the plaintiff-hospital sued for payment of services rendered to the defendant-husband Richard A. Klees. The Court of Common Pleas of Northumberland County denied preliminary objections asserting that the joinder of defendant-wife Cora Klees constituted the misjoinder of a party.<sup>136</sup> In its denial of the preliminary objections, the court stated:

[T]he challenge is to a common law doctrine which itself was created by the *courts*, not by a legislature. There is no need to be cautious of the legislature's prerogative in cases such as these. Indeed, it is not even necessary to allege a constitutional defect in the common law before a court can take the initiative to alter it.<sup>137</sup>

This stance is in direct opposition to decisions of other Pennsylvania trial courts which have determined that any modification of the doctrine is an "unnecessary and an unwarrantable exercise of judicial power."<sup>138</sup>

### *B. Abolishment*

Other Pennsylvania courts have determined that the abolishment of the doctrine of necessities is in accordance with the Equal Rights Amendment as well as the changing social conditions and mores of our society.<sup>139</sup> They view the doctrine as preserving a

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132. *Klees*, 20 Pa. D. & C.3d at 130 (emphasis in original).

133. *Fink*, 6 Fiduciary Rep. 2d at 306.

134. *Id.*

135. 20 Pa. D. & C.3d 124 (Northumberland Co. 1981).

136. *Id.* at 125.

137. *Id.* at 128 (emphasis in original).

138. *Nathans*, 27 Fiduciary Rep. at 564.

139. See *Beth Israel Med. Ctr. v. Sweet*, 46 Pa. D. & C.3d 1 (Pike Co. 1986) (holding that a married woman who neither requested that her husband receive medical treatment nor

"relic of a bygone age."<sup>140</sup> Thus, in support of complete abolition of the doctrine, these courts have relied on two guiding principles: (1) the legislature is the more appropriate body to modify the doctrine; and (2) equality of the sexes cannot be achieved by imposing an equal duty on the wife to pay for necessities that may be supplied to her husband.<sup>141</sup>

The first principle is in direct contradiction to the opinion endorsed by courts advocating a modification of the doctrine of necessities. The courts that support abolition of the doctrine recognize that in the course of the common law's "development and application it undergoes changes and elaboration."<sup>142</sup> However, the extension of the doctrine endorsed by other courts constitutes a "radical departure from the underlying reasons and implicit assumption upon which the duties were based at common law. . . ."<sup>143</sup> Consequently, the legislature—"who is not bound by the strictures of precedent and not committed to the slower methods of judicial elaboration"—should make the transition.<sup>144</sup> Courts suggesting abolition have gone no further than to declare the doctrine of necessities unconstitutional as repugnant to the ERA. In so doing, the courts have warned that "[t]o adjudicate beyond this point is to delve in an area of the law reserved to the legislature, delve in speculation and dicta that is not necessary to resolving the issue presented."<sup>145</sup> Thus, in facing a law that is repugnant to the constitution, the "duty of the court is to strike it, not to add provisions to it that will make it conform to the constitutional provision. The latter function is legislative."<sup>146</sup>

Advocates of the doctrine's abolishment believe it is possible to strike down the offensive common law rule and at the same time

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contracted for such treatment is not liable for her husband's debt); *Nan Duskin v. Parks*, 11 Pa. D. & C.3d 299 (Philadelphia Co. 1978) (rejecting the view that equality of the sexes can be achieved under the mandate of the ERA by imposing an equal duty on the wives for necessities that may be supplied to their husbands); *Nathans*, 27 Fiduciary Rep. 561 (holding that allegation that necessities were furnished to defendant's wife is insufficient to sustain *assumpsit* action against husband).

140. *Nathans*, 27 Fiduciary Rep. at 565.

141. *Id.* at 564.

142. *Id.* The court further stated that "[w]hen the same reason behind a common law rule applied to a new situation, the courts were not diffident in elaborating on the old rule to make it fit a new situation." *Id.*

143. *Id.*

144. *Id.* at 564.

145. *Nathans*, 27 Fiduciary Rep. at 567.

146. *Id.*

implement the constitutional amendment mandating equality of the sexes.<sup>147</sup> In other words, the courts are repeating what the Pennsylvania Supreme Court held in *Henderson v. Henderson*<sup>148</sup> and *Conway v. Dana*<sup>149</sup>—that the duty to support can best be determined by avoiding the artificial responsibilities and by looking to the capacity of the parties.<sup>150</sup> These courts warn that to impose the same common law duty on one of the parties to a marriage is to make the marital relationship the test and basis for liability.<sup>151</sup> Thus, the ERA's mandate of equality cannot be achieved by burdening the wife with the legal duty to pay for necessities supplied to her husband.

## VI. Pennsylvania's Solution: Abolition

The purpose of the Equal Rights Amendment is clear: to insure equality of rights and to eliminate sex as the basis for the distinction of rights.<sup>152</sup> The changing conditions of society are also clear. Women are growing more independent and, in many cases, may no longer need protective legislation. These two principles mandate a change in Pennsylvania's doctrine of necessities. However, the change advocated by the majority of Pennsylvania courts, that the spouse who incurred the debt is primarily liable and the nondebtor spouse secondarily liable, is a misguided and unwarranted exercise of judicial power. The solution, therefore, regarding the future of this archaic doctrine is not modification, but abolition.

Two states, one a geographic neighbor of Pennsylvania, have judicially abolished their common law doctrines of necessity. Maryland and Virginia abolished the doctrine in *Condore v. Prince George's County*,<sup>153</sup> and in *Schilling v. Bedford County Mem'l Hosp.*,<sup>154</sup> respectively. Both states have Equal Rights Amendments.<sup>155</sup> In both cases, the courts recognized the options avail-

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147. *Id.* at 566.

148. 327 A.2d 60 (Pa. 1974).

149. 318 A.2d 324 (Pa. 1974).

150. *Id.*

151. *Id.*; *Henderson v. Henderson*, 327 A.2d 60 (Pa. 1974).

152. *Id.*

153. 425 A.2d 1011 (Md. 1981).

154. 303 S.E.2d 905 (Va. 1983).

155. MD. CONST., DECLARATION OF RIGHTS art. 46; VA. CONST., art. I, § 11.



able in terms of modification by extension.<sup>156</sup> However, the highest courts of both Maryland and Virginia have explicitly rejected this option. Maryland's highest court, the Court of Appeals, recognized that extending the common law would "create a cause of action against a wife where none ha[d] previously existed."<sup>157</sup> Pennsylvania, in using the ERA to extend rights and duties in other areas, has also avoided creating a cause of action where none previously existed.<sup>158</sup> Thus, refusal to extend the obligation of providing necessities bought by the husband for the wife would be in accordance with the ERA.

Finally, both courts recognized that an extension of the doctrine would have a significant effect on family life; consequently, any modification should be instituted by the legislature.<sup>159</sup> A minority of Pennsylvania courts have also advocated for legislative rather than judicial action.<sup>160</sup> Legislative action is more appropriate than judicial action given the broad range of modern marital relationships. The legislature, as representatives with access to the data of its constituency, is more attuned to the needs of Pennsylvania citizens than the judiciary.

Although this Comment advocates the abolishment of the doctrine, legislative action would be a better alternative than any judicially created modification. However, a caveat must precede any legislative action in that any statute enacted should *specifically* state the terms of a spouse's liability. Otherwise confusion will still exist regarding the extent of a spouse's liability.

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156. *Schilling*, 303 S.E.2d at 908 ("The hospital urges us to extend the doctrine so it applies to wives as well as husbands, rather than abolish it."); *Condore*, 425 A.2d at 1018 ("The County urges that the ERA has itself modified and superseded the common law doctrine as to necessities by imposing upon the wife a reciprocal liability for necessities supplied to the husband.").

157. *Condore*, 425 A.2d at 1019. The court further explained that this rationale was in keeping with other domestic relation areas affected by the ERA:

In *Rand*, we extended the common law rule as to support by a mother of her minor children by making her equally responsible with the father to the extent of her financial resources. We did not create a new cause of action against the mother in *Rand* because, under the common law, she was secondarily liable for child support, the father's obligation being the primary one.

*Id.*

158. See discussion *supra* Part II.

159. See *Condore*, 425 A.2d at 1019 ("Which best serves the societal need is, we think, a matter of such fundamental policy that it should be determined by the legislature."); *Schilling*, 303 S.E.2d at 908 ("[T]his task [of modification] if advisable, is better left to the General Assembly.").

160. See *supra* note 138.

For example, Virginia has subsequently modified its doctrine of necessities by statute.<sup>161</sup> However, problems have arisen regarding statutory interpretation. Ambiguity arises because the statute merely states that the doctrine of necessities is to be applied to both males and females alike.<sup>162</sup> Thus, the statute "leaves unaddressed the specific nature and degree of liability to be borne by each spouse for the cost of necessities incurred by one spouse."<sup>163</sup>

Any modification of the doctrine of necessities fails to recognize the multiplicity of modern marital support arrangements. Any form of the doctrine of necessities, by defining spouses' relationships with creditors, in effect establishes relatively inflexible marital economic relationships. Pennsylvania courts that modify the doctrine have boldly stated that "[a]s rights have been extended by law, so must responsibilities be correspondingly extended."<sup>164</sup> Such a statement is a generic pronouncement made with little insight into the structuring of a modern day marital relationship. Admittedly, more women are contributing to the household income than have in the past. However, some wives and some husbands remain economically dependent on their respective spouses. An extension of the doctrine would ignore such relationships and place liability on a spouse who arguably may not have an outside income.<sup>165</sup> Those who wish to structure their marital obligations along traditional lines are therefore limited in their ability to do so. Abolition of the doctrine would leave to individual couples the

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161. Virginia's legislature has since modified its doctrine by adding the following language to § 55-37 of the Virginia Code:

The doctrine of necessities as it existed at common law shall apply equally to both spouses, except where they are permanently living separate and apart. . . . No lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entirety.

VA. CODE. ANN. § 55-37 (Michie 1995).

162. Brennan, *supra* note 84, at 325.

163. *Id.*

164. *Geisinger Med. Ctr. v. Salerno*, 40 Pa. D. & C.3d 668, 670 (Montour Co. 1986).

165. In *Estate of Stromsted v. St. Michael Hosp. of Franciscan Sisters*, 299 N.W.2d 226 (Wis. 1980), Justice Abrahamson, in his dissent, condemned the joint and several liability approach stating:

The creditor's benefit may be attained at a substantial cost to the homemaker. Under the majority's formulation, a full time homemaker who has supported the family by contributing her services, who has little or no income or property, and to whom the husband owes the duty to support, becomes, in effect, a guarantor of payment for necessities supplied to her husband, herself and the children.

*Id.* at 233 (Abrahamson, J., dissenting).

definition and allocation of specific support duties within their marriage.

Furthermore, in holding women liable for their husbands' expenses, Pennsylvania courts provide no economic justification for the imposition. The current economic position of women cannot be characterized as strictly independent or dependent. While some wives are economically independent,<sup>166</sup> for many married women dependence is still a reality. If the current economic position of women defies class-wide characterization, it makes little sense to impose, through the necessities doctrine, a single characterization upon all women.<sup>167</sup> Instead, abolition of the doctrine would allow women freedom to contract for or out of liability. Consequently, an independent wife with significant financial means can accept liability without hardship while a dependent wife can avoid the hardship.

Courts that have modified the doctrine argue that such an action protects creditors. However, there is no evidence that creditors require more protection from married debtors than they do from unmarried debtors.<sup>168</sup> In *Jersey Shore Med. Ctr. v. Estate of Baum*,<sup>169</sup> the New Jersey Supreme Court rejected independent liability for married people with respect to their necessities.<sup>170</sup> The court believed that imposing such liability would "leave creditors of a dependent spouse without recourse to the only realistic source of payment, the financially independent spouse."<sup>171</sup>

This rationale was endorsed in Pennsylvania by the Court of Common Pleas of Northumberland County.<sup>172</sup> However, this reasoning is misleading and unpersuasive. Creditors can avoid this situation in at least two ways. First, a merchant does not have to give credit. If the merchant thinks the buyer is a bad credit risk,

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166. Over half of married women are employed outside the home. See U.S. DEP'T OF COMMERCE, *supra* note 121, at 401.

167. Note, *supra* note 6, at 1778.

168. *Id.* at 1790.

169. 417 A.2d 1003 (N.J. 1980).

170. *Id.*

171. *Id.* at 1009.

172. "The common law rule was not so much that the husband must pay because the wife could not, but that *someone* from the financial unit must pay, and the husband was traditionally the only one to qualify. The concern that *someone* must pay is just as legitimate today as it was hundreds of years ago." *Park Ave. Hosp. v. Klees*, 20 Pa. D. & C.3d 124,130 (Northumberland Co. 1981) (emphasis in original).

he can demand payment in cash.<sup>173</sup> Second, creditors can treat married debtors in the same manner as unmarried debtors by limiting the "amount of individual credit to the debtor's independent ability to repay."<sup>174</sup>

Abolition will not leave a "needy" spouse without a source of financial protection. Scholars advocating abolition have posited that, given the current absence of consensus regarding correct marital roles, the most reasonable solution is to make the legal duty to support a nonspecific one. This duty would consist of a simple admonition to husbands and wives to financially and emotionally support one another. This would allow individual couples to define and allocate the specific support duties within their marriages.<sup>175</sup> An unenforceable duty to support does not undermine the duty's efficacy. Quite the contrary, some unenforceable laws serve symbolic functions; the effectiveness of symbolic laws depends on public affirmation rather than legal enforcement.<sup>176</sup> "People obey symbolic laws not for fear of legal sanction, but because they are backed by the consensus of society and the force of major social institutions."<sup>177</sup> Symbolic laws are quite possibly strongest in areas of traditional morality, such as exhortations to family support.<sup>178</sup>

## VII. Conclusion

The current trend in the Pennsylvania courts of modifying the doctrine of necessities by placing primary liability on the debtor spouse and secondary liability on the nondebtor spouse is an attempt by the courts to preserve a "relic of a bygone age."<sup>179</sup> The complexity of modern marital relationships demands an abolishment of any judicially created doctrine that attempts to structure marital finances. Neither the doctrine's practical effects, nor its premises, justify any existing modification. Moreover, the Pennsylvania Equal Rights Amendment should not be used to

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173. Note, *supra* note 6, at 1791.

174. *Id.*

175. *Id.* at 1798.

176. *Id.* (citing Gusfield, *Moral Passage: The Symbolic Passage in Public Designations of Deviance*, 15 SOC. PROBLEMS 175, 176-79 (1967)).

177. *Id.* at 1798.

178. Note, *supra* note 6, at 1798.

179. *Albert Einstein Med. Ctr. v. Nathans*, 27 Fiduciary Rep. 561, 565 (Philadelphia Co. 1977).

create a new cause of action for women without first ascertaining the economic reality or implications of such an action.

Judicial abolishment of any form of the doctrine of necessities is the solution. Abolishment would accommodate the various complexities of a marital relationship by recognizing the right of married couples to structure their own finances. Abolishment would also protect the property rights of the nondebtor spouse. Finally, should any modification be implemented, it should be the result of legislative, not judicial, action.

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